GENERAL COUNSEL OF THE
DEPARTMENT OF COMMERCE
Washington, D.C. 20230

Nov 11/11/74
OGC 74-2095

November 8, 1974

Honorable John S. Warner
General Counsel
Central Intelligence Agency
Washington, D. C. 20505

Re: United States v. International Business Machines Corporation, 69 Civ. 200 (S. D. N. Y.)

Dear Mr. Warner:

This will acknowledge your October 8 letters to Mr. Parrette and me asserting a violation of the Third Agency Rule in this Department's production, under judicial protective order but without CIA's consent, of certain classified documents to security-cleared representatives of International Business Machines Corporation (IBM) in connection with pretrial discovery in the captioned antitrust action. You indicate that our prior notification to you of the proposed production was not sufficient to satisfy the consent requirement of the Rule.

This Department is fully aware of the Third Agency Rule, and under ordinary circumstances would agree with your interpretation of its application. However, the circumstances here involved are anything but ordinary, in that we were under an affirmative legal obligation to comply with a court order to produce documents in our possession, including those to which you refer, whether or not the originating agency concurred.

The IBM case is now concluding its sixth year of pre-trial proceedings, during which time virtually every agency of the Government has been subjected by IBM to extensive discovery of documents concerning general purpose digital computers and closely-related matters. Many of these documents have been classified on national defense or foreign relations grounds, and in recognition of this fact the Court has entered Pretrial Orders No. 1, 2 and 13 to govern the protection and use of the information contained in such documents.

At the time the documents in question were released to IBM under the terms of those protective orders, IBM's discovery of agencies within the Department of Commerce was in its final stages. This discovery was also the last remaining major pretrial formality, and

the Justice Department had for some time been demanding abandonment of our punctilious resistance, on grounds of statutory privilege or the Third Agency Rule, to production of a substantial portion of the documents that were being sought by IBM. Furthermore, during a series of pretrial conferences in late June and early July, it was clear that the Court gave no credence whatsoever to our assertion of privilege concerning those documents. Accordingly, we informed certain other agencies, including CIA, that IBM's discovery demands of the National Bureau of Standards included classified documents originated by those agencies, and repeatedly urged those agencies to decide quickly whether they wished on their own behalf to assert to the Department of Justice any available defenses to discovery. In the meantime, we continued to deny IBM access to those materials.

At the end of July, the Justice Department, as legal representative of the Government in this proceeding, advised us that there was absolutely no legal basis on which we could assert national security classification as a defense to IBM's documentary production demands, even though another agency might have originated the classification. This conclusion was vigorously reenforced by the Court when I personally appeared before Judge Edelstein on August 1 and 6, at which time he made clear that he would seriously consider citing the Secretary of Commerce for contempt and imposing "coercive sanctions" if the parties could not promptly resolve the discovery impasse in IBM's favor. In this connection, it must be reiterated that discovery at the Department of Commerce was the last remaining issue of major significance requiring resolution before the case could be set for trial.

Following the pretrial conference on August 6, I was again advised by the Department of Justice that there was no legal basis for refusing to produce classified documents in response to IBM's discovery demands, that no other agency had successfully resisted production of classified materials in response to IBM's discovery demands and that no objection to production had been received from any of the agencies (including CIA) that had been alerted to the fact that classified material they had originated was subject to IBM's discovery demands on the Department of Commerce. In light of this advice, and at the behest of the Department of Justice, I ordered release of the classified documents in question to properly cleared representatives of IBM, subject to the terms and conditions of the Court's pretrial protective orders.

Against this background, it is clear that any violation of the Third Agency Rule involved in such release was, at best, only technical in nature and occurred solely by reason of good faith reliance on advice of the Department of Justice as counsel for all government agencies in discovery matters involved in this litigation. I might add that both the Department of Justice and the Court have, on many occasions, observed with disapproval that of all government agencies to which IBM has directed discovery demands, the Department of Commerce has stood virtually alone in its efforts to preserve third party interests in classified and proprietary information in its possession. Thus, far from treating classified documents in our possession irresponsibly, I submit that we have exercised every bit as much diligence and vigilance in their protection as have the originating agencies, if not more.

It should also be noted that no security agency other than CIA has expressed any objection to the actions we have taken, although documents ultimately made available by this Department to IBM under protective orders of the Court pertained not only to CIA but also to DIA, the State Department, the Defense Department, AEC, COCOM, NSC and CIEP.

I sincerely regret the intrusion of this issue into the otherwise cordial and most satisfactory relations that our respective agencies have enjoyed, and trust that the foregoing will serve to place in proper perspective the matters addressed in your two letters.

Sincerely,

Karl E. Bakke

General Counsel

cc: Deputy Attorney General
Assistant Attorney General,
Antitrust Division

SENDER WILL CHECK CLASSIFICATION TOP AND BOTTOM

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OFFICIAL ROUTING SLIP

TO	NAME AND ADDRESS	DATE	INITIALS
1	Bob,		
2			
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	ACTION		DIRECT REPLY		PREPARE REPLY
	APPROVAL		DISPATCH		RECOMMENDATION
	COMMENT		FILE		RETURN
	CONCURRENCE		INFORMATION		SIGNATURE

Remarks:

I talked to Eshreich again this morning, after writing my red ink note on the blue memo form below, and called his attention to the discrepancies in the last paragraph on page 2. He obviously would like to brush all this aside, and implies, at least, that Commerce either doesn't understand or is not telling the whole truth. I do not propose to get in a letter writing match with Justice, but we may have to go back to Commerce on this.

FOLD HERE TO RETURN TO SENDER

FROM: NAME, ADDRESS AND PHONE NO.	DATE
JDM	11/12/74

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FORM NO. 237 Use previous editions (40)

MEMORANDUM FOR: RJB

Is this accurate?

STATINTL

Bob - Those little checks in the margin are mine. Of last para pg. 2 re DOT advice to DOC is accurate our "friends" at DOT have some explaining to do.

(DATE)

STATINTL

FORM NO. 101 REPLACES FORM 10-101 WHICH MAY BE USED.
1 AUG 54